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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include Newton,
New Jersey and Riverhead, New York in
the New York, New York-Linden-Paterson-
Newark, New Jersey Television Market

MM Docket No. 93-290

**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding proposing hyphenation of the New York, New York-Linden-Paterson-Newark, New Jersey market to include Riverhead, New York and Newton, New Jersey.

From the comments filed by the broadcasters in this proceeding, it appears that the reason they seek market redesignations is not in order to gain recognition of the actual competitive "commonality between the proposed community to be added to a market designation and the market as a whole".¹ Instead, their primary purpose appears to be to use the Commission's hyphenation mechanism in order to circumvent the statutory requirement that in order to gain mandatory carriage rights, these "distant" stations must indemnify cable operators for any increased copyright liability. Through market redesignation, they seek to avoid copyright

¹ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 2978 (1993).

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liability for forced carriage on cable systems in areas substantially beyond the area they serve over the air, the area for which they receive advertising, or the area to which they address their programming. This is simply not a legitimate reason for redesignation.

The broadcasters' complaint that they are "competitively disadvantaged" by their location in a community that is not hyphenated on the FCC's major market list arises from the fact that Congress did not confer copyright royalty free "local" status on all stations within an ADI. Congress was clearly aware that some stations could qualify as must carry stations under the Cable Act but still would be "distant" signals for copyright purposes.² It therefore included the requirement that these stations indemnify cable operators for any increased copyright liability resulting from their carriage.

Given this statutory scheme, the need to indemnify for copyright liability simply should not constitute a "clear showing of particularized need"³ justifying market hyphenation. The station seeking hyphenation has not demonstrated anything unique to its competitive situation. Rather, all stations that are located in communities in an ADI that are not part of the major market list in Section 76.51 face this same situation. As described above, it is a circumstance that Congress clearly understood and did not change. The Commission's process for market hyphenation should not be used to end run the statutory scheme.

Finally, as a procedural matter, many cable operators outside a station's 35 mile zone will be affected should the Commission rehyphenate a market. But,

² 47 U.S. C. § 533(h) (defining "local commercial television station" to exclude stations distant under Section 111 of the Copyright Act, if the station does not agree to indemnify the cable operator for any increased copyright liability).

³ Notice at ¶ 3.

while the Commission's rules require a broadcaster to serve cable operators with a request to modify a television market,⁴ it appears not to require service where petitions for rulemaking to hyphenate a market are filed. Cable operators will be significantly affected in either case. The Commission should amend its rules to make clear that broadcasters must serve these petitions on cable operators to ensure that operators are aware that their signal carriage complement and blackout obligations may be affected, and have a full opportunity to comment prior to issuance of a Notice of Proposed Rulemaking.

Respectfully submitted,

NATIONAL CABLE TELEVISION
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⁴ See 47 CFR § 76.7.

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A handwritten signature in black ink, appearing to read "Leslie D. Heath", written over a horizontal line.

Leslie D. Heath

CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 18th day of January, 1994, copies of the foregoing "Reply Comments of the National Cable Television Association" were delivered by first-class, postage pre-paid mail to the following parties:

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